BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF THE RULING UPON DECLARATIONS OF CLAIM OF ARTIFICIALLY STORED GROUND WATERS IN THE QUINCY GROUND WATER SUBAREA	
ADRIAN VAN HOLST, JAMES A. HEPBURN, ROBERT L. SCHUH and as Trustee for JOHN M. SHINN, PAUL LAUZIER, R. W. SWEEN, W. R. FLINT, GLENN MADDOX, THOMAS E. WALDROP and PHILIP A. ANDERSON, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Respondents.	PCHB No. 798-A FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of the acceptance of declarations of artificially stored ground water of the United States by the State of

Washington, came before the Pollution Control Hearings Board, Chairman Chris Smith and Walt Woodward, on June 4, 5, and 6, 1975 in Lacey. By agreement of the parties, final arguments were heard on May 3, 1976 in Seattle. Hearing examiner David Akana presided.

Appellants were represented by their attorney, H. K. Dano; respondent Department of Ecology was represented by Charles B. Roe, Jr., Senior Assistant Attorney General and Laura E. Eckert, Assistant Attorney General; respondent Bureau of Reclamation (hereinafter "Bureau") was represented by Paul Lemargie, its attorney. Eugene E. Barker and Sherri Darkow recorded the proceedings.

Having heard and read the testimony, having examined the exhibits, having considered the briefs and contentions of the parties, the Pollution Control Hearings Board makes the following

FINDINGS OF FACT

I

1. The background of this matter has been stipulated to as follows:

a. After many years of studies, investigation, reports and hearings (Exhibit R-1 entitled "Chronological Steps in Connection With Approval and Development of the Grand Coulee Dam - Columbia Basin Project"), funds in the sum of $15,000,000 were initially made available for the construction by the United States of Grand Coulee Dam by President Franklin D. Roosevelt through the Public Works Administration on July 27, 1933, under Section 202 of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 195). On July 16, 1934, a contract was let by the United States for the construction of Grand Coulee Dam and Power Plant. The Congress by the Act of August 30, 1935 (49 Stat. 1028) (Exhibit R-2) authorized the construction of Grand Coulee Dam and validated the contracts then in force.

b. Thereafter, on January 28, 1938, a contract was awarded by the United States for completion of the left powerhouse and foundation for the pumping plant of the Grand Coulee Dam. In December of 1941 construction of the right powerhouse was authorized.

c. On January 1, 1942, the Bureau of Reclamation, the agency

of the United States in charge of the construction of the project (except for the right powerhouse) took over the remaining work on Grand Coulee Dam (the main structure of which was then completed). As the United States was then in World War II, no further construction work was done on features devoted solely to irrigation, except for some excavation work on the Main Canal and some construction work on the Equalizing Reservoir South Dam near Coulee City, Washington, during the war. On June 1, 1942, the 151 mile reservoir (later named Lake Franklin D. Roosevelt) behind Grand Coulee Dam was filled and the first water spilled over the spillway of the dam.

d. The Columbia Basin Project Act (57 Stat. 14) (Exhibit R-3) was passed on March 10, 1943. That Act authorized the project to be thereafter known as the Columbia Basin Project and provided that, together with the Act of August 30, 1935 and the Reclamation Project Act of 1939 (53 Stat. 1187) (Exhibit R-4), the Project Act and those two other Acts would govern the construction, operation and maintenance of the works constructed and to be constructed as a part of the project.

e. The Legislature of the State of Washington on that same day, passed and sent to the Governor for signature, chapter 275, Laws of Washington, 1943, which was signed by him on March 22, 1943. That chapter, in addition to adopting, authorizing, ratifying, enacting, and consenting to Columbia Basin Project Act stated in Section 1 thereof:

> "It is hereby declared to be the policy of the State of Washington in connection with lands within the scope of this act that may be irrigated through works of Federal reclamation projects to assist the United States in the reduction or prevention of speculation in such lands and in limiting the size of the holdings of such lands entitled to receive water from, through, or by means of the works of such projects, and otherwise to cooperate with the United States with respect to such projects. In furtherance of this policy this statute is enacted."

f. On May 10, 1945, the Secretary of the Interior filed a feasibility report for the project, as required by Section 9(a) of the Reclamation Project Act of 1939, as a statutory condition precedent to proceeding with the construction (other than on those mentioned above) of the rest of the project features devoted solely to irrigation. That report, House Document No. 172, 79th Congress, 1st Session (Exhibit R-5), lists the main features of the irrigation system, including the Potholes Reservoir with its active storage capacity and the distribution system therefrom and the acreages to be served thereby.

g. Thereafter on October 9, 1945, the United States entered into repayment contracts with the three Columbia Basin irrigation districts for the construction of the Columbia Basin Project multiple-

use features and its features devoted solely to irrigation as set forth in Article 6(a) of those contracts.

h. In 1946 and for the next several years, following the end of World War II, the United States undertook to construct the major features devoted solely to irrigation under said repayment contracts to serve the first half of the project, including the rest of the pumping plant, Feeder Canal, North and South Dams, Equalizing Reservoir, Main Canal, Long Lake Dam, Bifurcation Works and the West and East Canals and related works. O'Sullivan Dam was started in 1947 and it along with the Potholes Reservoir created thereby were completed in 1951, as were portions of major wasteways and drainage channels for collection of surface flows and artificially stored ground water. The irrigation facilities to serve certain irrigation blocks were also substantially completed in 1951.

i. The Columbia Basin Project Act provides that the lands within the project shall be developed in irrigation blocks as the term is defined in the Reclamation Project Act of 1939. That latter Act defines an irrigation block as an area of arid or semiarid lands in a project in which in the judgment of the Secretary of the Interior, the irrigable lands should be reclaimed and put under irrigation at substantially the same time, and which is designated as an irrigation block by order of the Secretary.

j. On June 14, 1951, the first irrigation pump in the Grand Coulee Dam Pumping Plant was started by lifting water 280 feet out of the Columbia River canyon for testing the irrigation system prior to the start of the 1952 irrigation season. On March 18, 1952, the first water was released into the section of Main Canal below Long Lake Reservoir from it and subsequently to the East and West Canals and laterals and related facilities leading therefrom. This began the test year and brought irrigation water from the Main Canal irrigation system to more than 65,000 irrigable acres of land.

k. These irrigated lands were within that geographical area in the northern portion of the project that, approximately 21 years later, was designated by the State of Washington as the Quincy Ground Water Subarea.

l. The Quincy Ground Water Subarea is a saucer-like topographic and structural basin. The northern and southern boundaries are formed by the inward facing ridges of the Beezley and Frenchman Hills. The western boundary is formed by the Evergreen-Babcock Ridge, the eastern boundary by the East Low Canal at the toe of the eastern upslope. The position and shape of the water table in the subarea is largely determined by the geologic structure of the basin.

m. The Frenchman Hills barrier is quite effective in impeding the southward movement of ground water, as is the strata in the Lind Coulee area east of the hills. The gap in the barrier, where Ice Age

ice-melt floods carved the Crab Creek channel, is now blocked by O'Sullivan Dam which has created Potholes Reservoir.

n. The overburden of coarse sand, gravel, and boulders carried into the basin as Ice Age flood outwash is very permeable and yields large quantities of water wherever it is fully saturated. The underlying fine-grained sediments contain much stored water but yields it sparingly to wells except where relatively permeable sand strata is penetrated. Basalt bedrock has only a small percentage of cracks and openings for storage of water; such water movement as occurs here is primarily horizontal since movement is confined to the thin contact zones between successive lava flows.

o. Prior to the importation of project surface water beginning in 1952, the ground water hydrologic system was in balance with an average annual rainfall of eight inches. There was some irrigation employing ground water pumping near Quincy and west of Moses Lake, and by direct withdrawal from Moses Lake and from springs in the present Potholes Reservoir bed.

p. The ground water table during this period was from 70 to 200 feet below ground surface except adjacent to Moses Lake and in the Potholes area where it reached the surface at the lowest elevations.

q. The irrigation blocks and portions thereof in the Quincy Ground Water Subarea were developed in accordance with a planned program under which water was made officially available therefor each year starting in 1953 and continuing through 1966. The total irrigable area of all of said blocks and portions was 293,821 acres. Within a period varying from 2 to 13 years after irrigation was commenced in a given area, the underlying ground water reached levels in balance with the new hydrologic conditions.

r. Drainage works for those blocks and portions thereof in the Quincy Ground Water Subarea, except for certain basic drains and wasteways (portions of the costs of some of which were charged to drainage) initially constructed along with the project irrigation system, were constructed over the years as the Irrigation Blocks were developed under irrigation farming when the need therefor arose as a result of the rising ground water table. Drainage works would protect project lands, recover the artificially stored ground water which, after irrigation, returned to the ground, and prevent those waters from being dissipated by natural waste.

s. Some drains, like the wasteways, also collected some irrigation farm surface runoff in addition to artificially stored ground waters. Those drains and drainage systems and wasteways (to some extent) were designed to protect project lands and to convey the recaptured artificially stored ground water therein to the Potholes Reservoir behind O'Sullivan Dam, which dam and reservoir were also designed to recapture artificially stored ground waters migrating under-

ground to them and to prevent their being dissipated by natural waste, as well as to recapture surface waste, seepage and return flow waters and natural runoff tributary thereto. The investment in the drainage system in the Quincy Ground Water Subarea, which is all tributary to the Potholes Reservoir, through fiscal year 1974 was $17,079,067. The total cost of constructing O'Sullivan Dam, grouting the bedrock on which it was built, and clearing the Potholes Reservoir formed by it when that work was completed in 1951 was $13,467,261. The United States has invested in O'Sullivan Dam, the Potholes Reservoir and their collection system over thirty million dollars, a substantial portion of which was for the recapture of artificially stored ground water so that it would not be dissipated by natural waste and so that it could be used again as a part of the project water supply and under water service contracts and ground water licenses.

t. Although the Columbia Basin Project Act was amended in minor respects on several occasions over the years, it was not until the Act of Congress of October 1, 1962 (76 Stat. 677) (Exhibit R-6) was passed that major changes were made. The Act repealed many of the special provisions of the Columbia Basin Project Act and provided in Section 3 that the project shall be governed by the Federal Reclamation Laws.

u. Thereafter, the repayment contracts with the three Columbia Basin irrigation districts were amended to conform them to the general Federal Reclamation Laws and to bring them up-to-date, resulting in the present Amendatory, Supplemental, and Replacement Repayment Contracts of December 18, 1968, which are still in effect as originally entered into. The irrigation districts took over the operation and maintenance of the project transferred works for the United States on January 26, 1969. The United States continues to operate the project reserved works and the special reserved works under said contracts.

v. In 1967, a tentative determination was made by the State that all the ground water available for appropriation in a portion of the Quincy area under consideration had apparently been appropriated.

w. As a result of the Memorandum of Understanding (Exhibits R-7, 8 and 9), the five-year ground water study referred to therein was undertaken to verify the tentative determination that all the ground waters available for appropriation had been appropriated with the completion date of the study set for December 31, 1972. Also, the Bureau, in accordance with said documents and Memorandum, and with the State's consent, undertook in 1967 and continued until after the study was substantially completed, its licensing of third parties to withdraw some of its artificially stored ground waters in that area and its charging a fee therefor to cover the costs allocated to operation and maintenance and construction of the project irrigation system which had made and was continuing to make the artificially stored ground water available for use by and under the project.

x. On January 15, 1973, following completion of the study and a determination that all the ground water available for appropriation in the original and a subsequent expanded Quincy area (for study purposes) had been applied for and/or appropriated, the Deputy Director of the Department of Ecology designated the Quincy Ground Water Subarea pursuant to RCW 90.44.130 as chapter 173-124 WAC (Exhibit R-10). After the Quincy Ground Water Subarea was designated and within the statutory period and the extensions thereof granted by the Department of Ecology, the United States timely filed its declarations pertaining to artificially stored ground waters in the Quincy Ground Water Subarea and its declarations of artificially stored ground waters which had been and were then being withdrawn therefrom.

y. After publication of notice on November 15 and 22, 1974, the Director of the Department of Ecology on January 8, 1975, accepted said declarations subject to the conditions. Appellant appealed the decision to this Board.

2. The department's supervisor in charge of the processing of the Bureau's claim of declaration began preparing an environmental impact statement (EIS). He concluded, however, that the type of action the department was to take would not have any significant impact on the environment. (Tr. 1, p. 143). No EIS was prepared for this matter at issue. A "negative determination" was made, however, but was never reviewed by any other person. (Tr. 1, p. 146).

3. The amount of artificially stored ground water accepted by the department is based on adequate and sufficient information. The record is replete with the basic data that the Bureau and the department relied on. From the basic data, the Bureau concluded that its claim was approximately 3.543 million acre-feet of which 695,000 acre-feet was in active (moving) storage and 2.848 million acre-feet was in static (dead) storage. (Tr. 3, p. 19). The department concluded that the Bureau's claim should be allowed at 3.493 million acre-feet of stored ground water of which 614,142 acre-feet was in active storage and 2.88 million acre-feet was in static storage. (Tr. 3, p. 59). The Bureau's computations

support this conclusion. Appellants, on the other hand, have not shown any material error on the part of either respondent and have failed to meet their burden of proof.

We find that the information relied on by the department was adequate. Further, we find that the evidence shows that the ground water was captured as a result of the efforts of the Bureau.

4. The amount of water sold under waste seepage and return flow contracts (9,711 acre-feet) is small in comparison to the amount claimed in the declaration (3.493 million acre-feet). Moreover, the amount involved in the contracts is but a part of the total amount claimed and not in addition thereto. (Tr. 2, pp. 66-89).

5. Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the persons and subject matter of this proceeding.

2. The Pre-Hearing Order entered on June 5, 1975 controls the contentions to be resolved. With respect to the adequacy of information and sufficiency of evidence to support the Bureau's claim of 3,493,142 acre-feet of stored water in the Quincy Subarea, we conclude that appellants have failed in their burden of proof to show a material error on the part of the department. The department has, on the other hand, presented such evidence as would factually support its determination.

3. Appellants have not shown how the waste seepage and return

flow contracts would materially affect the department's determination and therefore have failed in their burden of proof.

4. With respect to the constitutional taking issue raised by appellants, we conclude that this issue is properly one that a court should decide. We have no jurisdiction to decide a substantive constitutional issue.

5. Appellants, having dropped their contentions under the National Environmental Policy Act, allege noncompliance with the State Environmental Policy Act (SEPA) chapter 43.21C RCW with respect to the department's order, DE 74-772. The alleged noncompliance is with respect to the department's decision under RCW 90.44.130 and not to the physical facilities constructed by the Bureau prior to the effective date of SEPA. The construction of facilities has surely passed the "'critical stage' of completion foreclosing the consideration of environmental protection desired by the act." Eastlake Com. Coun. v. Roanoke Assoc., 82 Wn.2d 475, 493 (1973). For existing facilities, the actual claiming of stored ground water is made after an area is designated a subarea or zone. RCW 90.44.130. The "supervisor shall accept or reject such declaration or declarations with respect to ownership or withdrawal of artificially stored ground water. Acceptance of such declaration or declarations by the supervisor shall convey to the declarant no right to withdraw public ground waters from the particular area, sub-area, or zone, nor to impair existing or subsequent rights to such public waters." RCW 90.44.130. Clearly, the acceptance by the department of such a declaration could affirm to the declarant no more than it already had. The department's decision is merely the

remaining government action needed to account for ground water in a particular area after the area is designated a subarea or zone. Nothing the department decided could have altered that which was physically constructed. "Doubtless there may be ongoing projects at the effective date of SEPA which are at such a stage of development that the remaining governmental action, even though 'major,' could not possibly alter the program in accordance with RCW 43.21C.030(c) . . . . Thus SEPA is not applicable to the project which has reached that 'critical stage' of completion foreclosing the consideration of environmental protection desired by the act." Eastlake, supra at 493. (emphasis added). Assuming that the department's decision was an "action," we conclude that SEPA does not apply under the facts and circumstances of this case.

6. Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

ORDER

The Department of Ecology Order DE 74-772 accepting the declarations of the United States Department of the Interior, Bureau of Reclamation to an amount of 3,493,142 acre-feet of artificially stored ground water, of which 614,142 acre-feet are subject to withdrawal and use, subject to condition set forth therein is affirmed. The appeals of the appellants

are hereby dismissed.

DONE at Lacey, Washington, this 11th day of June, 1976.

POLLUTION CONTROL HEARINGS BOARD

Chris Smith
CHRIS SMITH, Chairman

Walt Woodward
WALT WOODWARD, Member